No. 13245

BRIEF FOR AMICUS CURIAE

In The

United States Court of Appeals

For the Ninth Circuit

Western Air Lines, Inc., *Petitioner,*

v.

Civil Aeronautics Board, *Respondent.*

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SUBJECT INDEX

PAGE

Citations

CASES:

STATUTES:

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JURISDICTION OF THE COURT

This Honorable Court has jurisdiction to review this proceeding under Section 1006 of the Civil Aeronautics Act, Act of June 23, 1938, as amended, 52 Stat. 1024, 49 U.S.C. 646, and under Section 10 of the Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. 1009.

STATEMENT OF THE CASE

Petitioner, Western Air Lines, Inc., seeks review of an order of Respondent, Civil Aeronautics Board, Order No. E-6040, dated January 17, 1952 which provided in part that (I) the temporary certificate of public con-

venience and necessity of Bonanza Air Lines, Inc. should be amended to authorize additional local air service between Los Angeles, San Diego and Phoenix via various intermediate stations including El Centro and Yuma, and that (II) Petitioner's permanent authority to serve El Centro and Yuma should be suspended. The duration of Bonanza's authority to serve El Centro and Yuma was made co-terminus with the expiration date of its basic route certificate (December 31, 1952) as was the suspension of Western's rights at these two stations; however, Respondent recognized that Bonanza's temporary certificate might be renewed for an additional period of time. If that contingency materializes, Bonanza's authority to serve El Centro and Yuma will be extended for such additional time and correspondingly the suspension of Western's authority will likewise be so extended.

Petitioner sought a stay of Respondent's order pending judicial review and on February 18, 1952, this Court granted a stay and entered the following order:

> ". . . stay pending a determination by the Court of the legal issue of whether respondent had statutory power, after notice and hearing, to suspend petitioner's authority to serve El Centro, California, and Yuma, Arizona, upon findings that the public convenience and necessity no longer required service to such points by petitioner, but rather required service by the intervenor".

The Court directed that the parties file briefs directed solely to the legal issue presented in the above order.

On March 19, 1952, this Court granted Midwest Airlines, Inc., and Wisconsin Central Airlines, Inc., permission to file an Amicus Curiae brief in the above cause because of their interest in the outcome of this litigation.

QUESTIONS PRESENTED

The questions presented by the petition for review are as follows:

(I) Does Section 401(h) of the Civil Aeronautics Act give Respondent statutory authority to suspend a permanently certificated air carrier at a point or points and to substitute therefor another carrier?

(II) If the answer to the above question is in the affirmative, did the Civil Aeronautics Board properly exercise its authority to suspend in the case presented here for review?

(III) If Section 401(h) does give Respondent authority to suspend a permanent certificate and if Respondent exercised such authority, does such action involve a taking of property without compensation in violation of the 5th Amendment of the Constitution?

SUMMARY OF ARGUMENT

(I) Section 401(h) of the Civil Aeronautics Act authorizes Respondent after notice and hearing to "suspend" a certificate in whole or in part if "the public convenience and necessity so require." This language is so clear and unambiguous that there is no room for construction by this Court. However, even if this Court were to examine the legislative history of the statute, the expressed desire to provide for stability within the air transportation system, the broad objectives of the Civil Aeronautics Act, and the other relevant provisions of the Statute, it would find no reason for adopting any but the usual and literal meaning of the words of this Statute.

(II) Respondent's action in suspending Western at El Centro and Yuma was not as alleged by Petitioner a revocation which could only be ordered for an intentional violation of the Statute but was in fact a decision to make Petitioner's authority temporarily inoperative. That the action taken was not a "device" to enlarge Respondent's area of jurisdiction is completely explained by the fact that Respondent needed no such device since it could eliminate the same two points under consideration by means of its statutory authority to modify, alter or amend a certificate.

(III) Section 401(h), as interpreted, does not involve a taking of the Petitioner's property without just compensation even if it be assumed that Petitioner's may now raise this issue when it failed to do so before the agency. It is firmly established that Petitioner had no rights greater than those conferred by its certificate and the limitations made thereon. One such limitation was the reserved power of the Civil Aeronautics Board to suspend that certificate in whole or in part, whenever such action was required by the public convenience and necessity. That being the case, Petitioner has not been deprived of a right for which there is constitutional protection.

I. THE CIVIL AERONAUTICS BOARD HAS STATUTORY AUTHORITY TO SUSPEND A PERMANENTLY CERTIFICATED AIR CARRIER AT A POINT OR POINTS AND TO SUBSTITUTE THEREFOR ANOTHER CARRIER.

A. The Statutory Authority of Section 401(h) Is Clear and Unequivocal.

Section 401(h) of the Civil Aeronautics Act of 1939, as amended (52 Stat. 987, 49 U.S.C. 481), provides in part as follows:

> "The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may . . . suspend any such certificate, in whole or in part, if the public convenience and necessity so require . . ."

With respect to the interpretation of this statutory provision there exists only two possible questions:

1. What does it mean to "suspend" a certificate in whole or in part?
2. What are the standards which control public convenience and necessity?

The Court in this case has ruled out the second of these two questions in its order dated February 18, 1952, by stating the legal proposition here involved in such a manner as to assume for the purposes of this case that the public convenience and necessity no longer required service at El Centro, California, and Yuma, Arizona, by Western Airlines, but rather required service by Bonanza Airlines.[1]

The sole question of statutory interpretation at issue, therefore, concerns the definition of the word "suspend", as used in the context of Section 401(h). Webster defines "suspend" as follows:

> "to debar temporarily from any privilege, to cause to cease for a time, to make temporarily inoperative".

The Civil Aeronautics Board itself has recognized that this commonly accepted definition of the word "suspend" is the one to govern the operation of the statute. In the *All American Airways, Inc. Suspension Case,* 10 CAB

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[1] ". . . stay pending a determination by the Court of the legal issue of whether respondent had statutory power, after notice and hearing, to suspend petitioner's authority to serve El Centro, California, and Yuma, Arizona, upon findings that the public convenience and necessity no longer required service to such points by petitioner, but rather required service by the intervenor".

24, 27 (1949), the Board made the following observations with respect to its understanding of the word "suspend":

> ". . . suspension permits possible return to the original status . . . suspension, while not imparting the same permanence as either revocation or abandonment may be invoked by either the carrier or upon the initiative of the Board."

The only time that Sec. 401(h) was discussed by a Court there seemed to be absolutely no problem in connection with the scope of the authority conferred. In the case of *Pan American-Grace Airways v. Civil Aeronautics Board,* 178 F. 2d 34, 36 (App. D. C. 1949), the Court said:

> "It is *clear* from this provision (sec. 401 h) that the Board had the power, after notice and hearing, to grant Panagra's petition and to suspend Braniff's certificate, subject to the President's approval." (Emphasis added)

B. Where the Statute As Here Is Free From Ambiguity There Is No Room for Construction By the Court.

The statutory authority of the Civil Aeronautics Board to suspend a certificate in whole or in part if the public convenience or necessity so require is so free from doubt, so unambiguous that this Court may not properly speculate as to the intent of the Congress. In the case of *Helvring v. Hammel,* 311 U. S. 504, 85 L. Ed. 303 (1941), the Supreme Court made the following observation:

> "True, courts in the interpretation of a statute have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance would lead to absurd results, *United States v. Katz,* 271 U. S. 354, 362, or would thwart the obvious purpose of the statute, *Hargar Company v. Helvering,* 308 U. S. 389. But courts are not free to

reject that meaning where no such consequences follow and where, as here, it appears to be consonant with the purposes of the Act as declared by Congress and plainly disclosed by its structure".

California courts are uniformly in accord with the above stated tenet of statutory construction. In the case of *Hurley v. Rubis,* 233 P. 2d 27 (1951), the court made the following statement:

> "It is a cardinal rule that a statute free from uncertainty and ambiguity needs no interpretation. A court may not by judicial construction substitute its ideas of intent of a statute when that intent is unmistakably expressed and when the statute is not ambiguous or uncertain . . ."

The following cases are to the same effect: *Deluca v. Fish and Game Commission,* 229 P. 2d 398, 103 Cal. App. 2d 273 (1951); *People v. Knowles,* 35 Cal. 2d 175, 217 P. 2d 1 (1950):

C. Even If the Court Were to Look Beyond the Language of the Statute to Seek the Intention of Congress No Result Different From the Plain Meaning of the Language Would Be Found.

1. *A legislative history of the Civil Aeronautics Act is silent on the intention of Congress in respect to Section 401(h).*

In the *Caribbean Area Case,* 9 CAB 534 (1948), counsel for the competing airlines presented to the Board an exhaustive analysis of the history of the Civil Aeronautics Act and after such presentation the Civil Aeronautics Board made the following observations:

> "The legislative history of the Act has been cited to support the construction that has been urged before us, but we find nothing in that background determinative of our powers. Such material as has been called to our attention is completely inconclusive . . ." (p. 547).

2. *Power to suspend a permanently certificated carrier would not destroy the stability of the air transportation system.*

Petitioner has argued that the power to diminish the scope of a permanent certificate would make it insecure in its rights and would tend to destroy the stability of the air transportation system. To this argument there are at least two completely satisfactory answers: First, while stability in the air transportation industry is generally desirable, it is not to be secured at the price of other and more important elements of public convenience and necessity; and secondly, the power to suspend does not create such instability as to jeopardize the air transportation industry.

Both of these arguments were discussed in detail by the Civil Aeronautics Board in the *Caribbean Area Case,* supra, where it was noted that one of the objectives of conferring a certificate of public convenience and necessity was to bring about stability within the industry; but it was nevertheless recognized that such certificates carry with them obligations which are embodied in the concept of public convenience and necessity. Where the public convenience and necessity require suspension, therefore, the individual carrier's otherwise important right to stability must necessarily be subordinated.

This proposition is elementary in the field of public utility regulation. In the case of *State v. Public Service Commission,* 232 Mo. App. 535, 111 S. W. 2d 222, 229 (1927), the court said:

> "Let it be conceded that the act establishing the Public Service Commission, defining its powers and prescribing its duties, is indicative of the policy designed, in every proper case, to substitute regulated monopoly for destructive competition. The spirit of this policy is the protection of the public. The protection given the utility is incidental."

The suggestion that the power to suspend creates an atmosphere of instability seems highly doubtful and greatly exaggerated. Section 401(h) requires that suspension shall be ordered only after (1) notice, (2) a hearing, and (3) a finding that the suspension is required by the public convenience and necessity. The finding of the agency is limited by standards announced by the court in the case of *Johnston Broadcasting Co. v. Federal Communications Commission,* 86 App. D. C. 46, 175 F. 2d 351, 358 (1949)

> ". . . (1) The bases of reasons for the final conclusion must be clearly stated. (2) That conclusion must be a rational result from the findings of ultimate facts, and those findings must be sufficient in number and substance to support the conclusion. (3) The ultimate facts as found must appear as rational inferences from the findings of basic facts. (4) The findings of the basic facts must be supported by substantial evidence. (5) Findings must be made in respect to every difference, except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. (6) The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant."

Finally, the Civil Aeronautics Act provides for judicial review of orders issued by the Civil Aeronautics Board which further safeguards the airline industry against suspensions which are not legitimately required by the public convenience and necessity (52 Stat. 1024, 49 U.S.C. 646).

3. *The plain meaning of Section 401(h) is consistent with the broad objectives of the Civil Aeronautics Act.*

Section 2 of the Civil Aeronautics Act of 1939 envisages the broadest possible powers in the Civil Aeronautics Board in connection with the regulation of in-

terstate air transportation. This policy is quoted in full below.[2]

The court's attention is also directed to Section 205 of the Civil Aeronautics Act of 1938, as amended, (52 Stat. 984, 49 U.S.C. 425), which reaffirms that the Civil Aeronautics Board is empowered to perform all such acts as may be necessary in the exercise of its duties under the statute.[3]

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[2] Sec. 2 (52 Stat. 980, 49 U.S.C. 402). In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

[3] "Sec. 205 (52 Stat. 984, 49 U.S.C. 425). (a) The Authority is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act."

In the *Caribbean Area Case,* supra, the Civil Aeronautics Board discussed at length its understanding of the policy of the Civil Aeronautics Act vis-a-vis its power to make route adjustments. This discussion is quoted below in full.[4]

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[4] "The soundness of the construction we have given section 401(h) becomes apparent when tested by the broad objectives of the Act. In the Civil Aeronautics Act, Congress provided a comprehensive regulatory scheme designed to assure an air transportation system adequate to meet the public needs. Not the wishes or desires of the units comprising that system, but the overriding public welfare is the thought that pervades the entire statute. Moreover, the statutory plan envisages no mere passive watch over civil aviation but a positive course of action designed to foster actively the healthy and orderly growth of air transportation for the national good. The Board, as the agency entrusted with administration of the Act, was given as a guide to its action such fundamental purposes as "the encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense". To assure the accomplishment of the ends sought to be attained, Congress vested the Board with broad powers commensurate with the task assigned it.

"A narrow construction of the Act that would exclude from the Board's powers under section 401(h) all authority to make changes in certificates of public convenience and necessity, diminishing in any way the rights thereunder, would be wholly inconsistent with the basic objectives of the Act, and would make the private interests of the units comprising the air transportation system paramount to the public welfare. Under such an interpretation, the Board's appraisal of the factors set forth by Congress as its guide, once made and given expression in a certificate, would become irrevocable, notwithstanding subsequent changes in the facts upon which the Board's judgment was based that might turn once sound action into an instrument for thwarting the policy of the Act. There would be substituted for a transportation pattern, keyed to the public need, a route structure, in important respects dependent upon the will of the individual carriers and subject to change, no matter how urgent the public need for such change, only with the consent of those carriers.

"The consequences that might flow from the restrictive interpretation of section 401(h) that has been urged by Pan American

The position taken by the Civil Aeronautics Board in the above case is consistent with the construction procedure announced by the Supreme Court in the case of *Security and Exchange Commission v. Joiner Leasing Corporation,* 320 U.S. 344, 88 L. Ed. 88 (1943), where the Court at page 150 said:

> "However well these rules may serve at times to aid in deciphering legislative intent, they have long been subordinated by the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in the particular cases the generally expressed legislative policy."

The following cases are to the same effect: *Reynolds Spring Co.* v. *Commissioner of Internal Revenue,* 181 F. 2d 638, 640 (CCA 6th 1950); *Barrett* v. *Hunter,* 180 F. 2d 510, 513 (CCA 10th 1950); *Warren* v. *United States,* 177 F. 2d 596, 598, (CCA 10th 1949); *Adler* v. *Northern Hotel Co.,* 175 F. 2d 619, 621 (CCA 7th 1949).

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are forcefully demonstrated in other ways. For example, a small carrier, operating a needed but economically weak route, could be driven to even direr financial straits by the competition of a more powerful rival for traffic at a point which, though relatively unimportant in the over-all operations of the large carrier, constituted a major source of revenue for the smaller line, while the Board sat idly by, impotent to take the only action that under the circumstances would serve to accomplish the objectives of the Act. In such a situation the Board might well be faced with the equally unsatisfactory alternatives of permitting the small carrier to be forced into insolvency or of maintaining its ability to operate the required services by means of steadily increasing Government subsidy in the form of mail pay. And this situation could occur with respect to a point or points which, if served by the small carrier alone, would supply sufficient revenues to permit it to secure financial strength, and possibly complete self-sufficiency. We do not believe that Congress intended any such results."

4. *The power to suspend in Section 401(h) is not inconsistent with other sections of the Act.*

Petitioner argues that the power to suspend any part of a "grandfather" certificate would be inconsistent with the grant of such certificate, provided by Section 401(e)(1) of the Civil Aeronautics Act, since that section in effect established by legislation the routes which are required by the public convenience and necessity. It is a sufficient answer to this argument to note that Section 401(h) authorizes the Civil Aeronautics Board to suspend any certificate *in whole of in part* when such suspension is required by the public convenience and necessity. The statute does not authorize the Board to suspend in whole or in part certificates other than "grandfather" certificates. The all inclusive language of the statute must be taken literally.

Petitioner has also argued that if respondent had authority to suspend a certificate in whole or in part such authority would in effect duplicate the provision for a temporary certificate provided for in Section 401(d)(2) of the Act. The argument is advanced that Congress would not have authorized two methods of accomplishing the same objective and, consequently, the Court must rule that the authority to suspend in Section 401(h) does not mean what the language says. A similar though more difficult problem of statutory interpretation arises when Congress expressly authorizes one of two obvious procedures but is silent as to the alternative procedure. In such circumstances the Supreme Court has stated that the literal language of the statute must govern. In the case of *Neuburger* v. *Commissioner,* 311 U. S. 83, 85 L. Ed. 58 (1940) the Supreme Court said at page 88:

> "The maxim 'expressio unius est exclusio alterius' is an aid to construction, not a rule of law. It can never over-ride clear and contrary evidence of Congressional intent." *U. S.* v. *Barnes,* 222 U. S. 513."

The Civil Aeronautics Act clearly provides for the power to suspend in addition to the power to issue temporary certificates; whatever duplication of function may be involved is not material.

II. THE CIVIL AERONAUTICS BOARD PROPERLY EXERCISED ITS POWER TO SUSPEND IN THE CASE BROUGHT HERE FOR REVIEW.

In the order of the Civil Aeronautics Board brought here for review the Respondent made the following finding:

> "We have decided that the suspension of Western's authority to serve El Centro and Yuma should terminate with the expiration of the local service segment awarded herein to Bonanza, i.e., on December 31, 1952, when Bononza's certificate formally expires. However, it is possible that Bonanza's authorization may be temporarily extended by virtue of Section 9(b) of the Administrative Procedure Act and the filing of a timely application by Bonanza for renewal of its authority. If Bonanza's authority were thus extended it would be appropriate to continue the suspension of Western's authority until disposition of Bonanza's application. Otherwise there would result a needless duplication of service at El Centro and Yuma. Accordingly, Western's authority to serve El Centro and Yuma will be suspended up to and including December 31, 1952, or until final determination by the Board of a timely application by Bonanza for renewal of Segment No. 2 of its route No. 105, whichever shall last occur."

Petitioner has argued that the term of the suspension is so indefinite as to be the equivalent of a permanent revocation, which could be ordered only after an intentional violation of the Act, which was not here the case. While it is true that the time during which the suspension will operate has not and can not at this date be exactly determined, the standard by which its duration may

be measured proves that as of the date of Respondent's order the suspension was and could have been only temporary in nature.

A complete answer to Petitioner's objection in this respect is found in the fact that the Board does have statutory authority to "modify" a permanent certificate by *permanently eliminating* therefrom a point or points if such elimination is required by the public convenience and necessity. See: *Caribbean Area Case,* supra. That such a modification may from the carrier's point of view be equivalent to a "revocation in part" is immaterial. The very fact that Respondent did not exercise its power to modify under Section 401(h), but rather chose to suspend Petitioner at two designated points proves conclusively that the intention of the agency was to make Western's certificate temporarily inoperative in these respects in order that at a later date the agency might be able to alter the decision made.

III. THE SUSPENSION OF PETITIONER AT EL CENTRO AND YUMA DOES NOT INVOLVE A TAKING OF PROPERTY WITHOUT COMPENSATION IN VIOLATION OF THE CONSTITUTION.

A. General

Petitioner has argued that Section 401(h) of the Civil Aeronautics Act is unconstitutional, if this Court holds that Respondent has the right to suspend in part a permanent certificate of public convenience and necessity. The argument is advanced by Petitioner that it will not only lose the right to future profits at both El Centro and Yuma but will be forced to liquidate in an unsatisfactory market the investment it has made at the airport at both stations.

As a preliminary matter, the Court's attention is directed to the fact that Petitioner did not at any time raise a constitutional objection to the exercise of Respondent's statutory power to suspend its operation, even though an ample opportunity for such argument was given. Section 1006(a) of the Civil Aeronautical Act provides in part as follows:

> "No objection to an order of Authority (Board) should be questioned by the Court unless such objection shall have been urged by the Authority (Board) or if it was not so urged, unless there were reasonable grounds for failure to do so."

The recent case of *New England Air Express, Inc.* v. *Civil Aeronautics Board,* Case No. 11,274, App. D. C., decided February 21, 1952, is directly in point; cf. *Federal Power Commission* v. *Arizona Edison Co., Inc.,* CCA 9th, decided February 19, 1952.

B. Western Airlines Acquired No Property Rights Beyond the Terms of Its Certificate.

Sec. 401 (f) of the Civil Aeronautics Act provides in part as follows:

> ". . . there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require . . ."

Section 401 (g) of the Civil Aeronautics Act provides in part as follows:

> "Each certificate shall be effective from the dates provided therein and shall continue in effect until *suspended* or revoked as hereinafter provided . . ." (emphasis added)

The Supreme Court in the case of *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 84 L. Ed. 656 (1940), said:

> "No license was to be construed to create any right beyond the terms, conditions, and petition of the license, . . ."

Again in the case of *Ashbacker Radio Corporation* v. *Federal Communication Commission,* 326 U. S. 327, 90 L. Ed. 108 (1945) the Court stated:

> "Of course the Fetzer license, like any other license granted by the Commission, was subject to certain conditions which the Act imposes as a matter of law. We fully recognize that the Commission, as it said, is not precluded at a later date from taking any action which it may find will serve the public interest."

In the case of *L. B. Wilson* v. *Federal Communications Commission,* 170 F. 2d 793, 798 (App. D. C. 1948), the Court stated:

> ". . . a station license does not, under the Act, confer an unlimited or indefeasible property right . . . the right is limited in time and quality by the terms of the license and is subject to suspension, modification or revocation in the public interest."

No case has been found which purports to hold that the franchise of a public utility is not subject to the limitations of the statute under which it was issued. In the regulation and enforcement of such limitations, the government agency is not taking property without due process of law, even though its actions may restrict the use of the franchise and property acquired thereunder. In the case of *Rock Island Motor Interstate Company* v. *United States,* 90 F. Supp. 516 (D. C. Ill. 1949), the Court emphasized that the certificates to operate motor truck lines including "grandfather" rights are property of value and were entitled to constitutional protection. That proposition is not here denied. That Court was, however, careful to point out that there may be limitations on the extent of the property rights conferred by a certificate of public

convenience and necessity. At pages 521-522, the Court stated as follows:

> "Where, as here, the action of the Commission in the reopened proceedings results in material changes in the company's certificate and operating rights, and a revocation in whole or in part of such certificates and operating rights, the Commission's power so to act must be clearly evident from the statute . . . No such power is apparent from this record . . .".

In the leading case of *Santa Fe Pacific Railroad Company* v. *Lane,* 244 U. S. 492, 494, 61 L. Ed. 1275 (1917), the Supreme Court said:

> ". . . in view of . . . the reserved power to add to, alter, amend or repeal the granting act, no rights vested in the grantee within the meaning of the due process clause of the Fifth Amendment."

The following cases are to the same effect: *Greenwood* v. *Freight Co.,* 105 U. S. 13, 26 L. Ed. 961 (1881); *United States* v. *Birmingham Ferry Company,* 79, F. Supp. 569 (D.C. Ky. 1948); *Scheible* v. *Hogan,* 113 Ohio St. 83, 148 N. E. 581 (1925).

C. Respondent's Reserved Power to Suspend Petitioners Certificate is a Reasonable Limitation.

As discussed in the earlier portions of this brief, Sec. 401(h) clearly confers upon the Civil Aeronautics Board authority to suspend a certificate in whole or in part when such action is required by the public convenience and necessity. When Western Air Lines received its operating authority it knew, or should have known, that this limitation could be exercised at any time if the procedures and standards prescribed by the statute were followed. One of the few risks which the company and its stockholders took in this subsidized business (see Section 406 of the Act) was that its operating authority might in some man-

ner be diminished and that the company would suffer losses by reason of such action.[5]

The conclusion which may be drawn from this analysis is this: An act which imposes reasonable limitations and restrictions with relation to matters within the scope of the agency's authority does not violate the due process of law guaranty, although such restrictions interfere to some extent with the rights of private property.

IV. CONCLUSION

On the basis of the foregoing reasons the order of Respondent should be affirmed.

Respectfully submitted,

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April 4, 1952

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[5] This problem is similar in many respects to the firmly established fact that the holder of a certificate of public convenience and necessity has no right to be free from competition. See: *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 43, L. Ed. 341 (1898); *Central Ill. Public Service Co.* v. *City of Bushnell*, 109 F. 2d 26, (CCA 6th 1940); *In re Inland Pipe Company*, 143 Kan. 820, 57 P. 2d 65 (1936).